

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 April 2004

Case No.: 2003-BLA-5783

In the Matter of:

PAUL RAY WALDEN,
Claimant

v.

PEABODY COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:¹

Joseph H. Kelley, Esq.
For the Claimant

Philip J. Reverman, Jr., Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim filed by Paul Ray Walden for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, *et seq.*, as amended ("Act"). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were totally

¹ The Director, OWCP, was not represented at the hearing.

disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, and is commonly known as black lung.

A formal hearing in this case was held in Madisonville, Kentucky, on December 9, 2003. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. Statement of the Case

The Claimant, Paul Ray Walden, filed a claim for black lung benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, on April 18, 2001 (DX 4).² A Notice of Claim was issued on June 1, 2001, identifying Peabody Coal Company as the putative responsible operator (DX 18). On June 18, 2001, the Employer filed its Response to Notice of Claim (DX 19), and on June 29, 2001, the Employer filed its Controversion (DX 20). The District Director, OWCP, made an initial determination of nonentitlement (DX 23). The Claimant requested a formal hearing and the claim was referred to the Office of Administrative Law Judges on April 22, 2003 (DX 29).

A hearing was held in Madisonville, Kentucky, on December 9, 2003, before the undersigned Administrative Law Judge. The record was held open for 45 days for the submission of post-hearing evidence and transcriptions of depositions, and a subsequent, additional 30 days for the submission of briefs (Tr. 64, 65).

At the hearing, the Employer objected to the introduction of Claimant's Exhibit 1, an x-ray interpretation by Dr. Powell

² In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the December 9, 2003 hearing.

(Tr. 10). The Employer argued through counsel that Dr. Houser's report (see CX 4) contained an independent x-ray interpretation, and that the combined, independent interpretations of Drs. Powell, Whitehead, and Houser exceed the evidentiary limitations in the regulations (Tr. 16). The Claimant, in his closing brief, conceded that Dr. Houser's report did include an independent x-ray interpretation of a July 10, 1996 x-ray which, in turn, would exceed the evidentiary limitations; therefore, the Claimant withdrew Claimant's Exhibit 1 to comply with the regulations.

Employer's Exhibit 3 is an x-ray interpretation by Dr. Wiot of the July 10, 1996 film which was withdrawn by the Claimant (see CX 1). As the July 10, 1996 x-ray film will not be considered in this case (due to the withdrawal of Claimant's Exhibit 1), Dr. Wiot's interpretation is not admissible as rebuttal evidence as it no longer rebuts an x-ray of record. Dr. Wiot's interpretation (EX 3), therefore, will be given no probative weight or consideration.

The Employer offered, at the hearing, the deposition testimony of Dr. Powell in anticipation that the Claimant would submit the written report of Dr. Powell into evidence (EX 5). The Claimant chose not to include Dr. Powell's report as part of his case. The Employer, consequently, did not designate Dr. Powell's report on the Black Lung Benefits Act Evidence Summary Form (EX 4). Dr. Powell's report, therefore, while offered at the hearing, will not be given probative weight in determining this case.

II. Issues³

The controverted issues as listed on Form CM-1025 are as follows:

1. Whether the Miner has pneumoconiosis as defined by the Act and the regulations;
2. Whether the Miner's pneumoconiosis arose out of coal mine employment;
4. Whether the Miner's disability is due to pneumoconiosis;

³ At the hearing, controversion was withdrawn to the Issues of post-1969 employment, responsible operator, insurance, total disability, and the Issues listed in paragraph 18-A. The Employer conceded 18 years of coal mine employment (Tr. 27, 30).

5. The number of years of coal mine employment by the Claimant (see fn. 3); and,
5. The remaining issues set forth in paragraph 18, as well as the issues as to constitutionality of the Act and its regulations, are reserved for appeal purposes.

III. Findings of Fact and Conclusions of Law

The Claimant, Paul Ray Walden, was born on February 4, 1947 (Tr. 30). He completed the eighth grade and later attended vocational school to learn welding (Tr. 30-31). The Claimant has one dependent for purposes of augmentation of benefits; namely, his wife, Cheryl Walden, whom he married on November 9, 1968 (DX 8). His daughter, Ashley Michelle Walden, born on July 18, 1979, was dependent on the Claimant until her graduation from college in May 2001 (DX 10, 11; Tr. 31, 32).

The Claimant testified that he started smoking at age 18 (1965) at a rate of about one-half pack per day, and he quit about 10 years ago (1993) (Tr. 45-46). This testimony is supported by the physician's records. I find, therefore, that the Claimant has a smoking history of 28 years at a rate of one-half pack per day, quitting in 1993.

Coal Mine Employment

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to determine the beginning and ending dates of coal mine employment by using any credible evidence.

On his application, the Claimant stated that he worked in coal mine employment for 22 years (DX 2). At the hearing, the Employer conceded at least 18 years of coal mine employment (Tr. 27). The Claimant testified that all of his coal mine employment was surface mining (Tr. 34).

The Claimant's Employment History form lists coal mine employment with Peabody Coal from 1973 to 1993 (DX 4). The Claimant testified that he worked for Peabody Coal Company from May 1973 through May 1993 (Tr. 33, 34, 53). The Claimant's FICA earnings worksheet shows employment with Peabody Coal Company from 1973 to 1994 (DX 6). I find the Claimant has established 20 years of coal mine employment based upon the testimony of the Miner and the supporting FICA earnings sheets. On his Employment History form, the Claimant stated that over the relevant period he was a pit welder (Tr. 34).

The Claimant's last employment was in the Commonwealth of Kentucky; therefore, the law of the Sixth Circuit is controlling.

Responsible Operator

Peabody Coal Company has withdrawn its challenge to the issue of responsible operator, and I find that Peabody Coal Company is properly named as responsible operator pursuant to §§ 725.494 and 725.495 (Tr. 27, 30).

IV. Medical Evidence

X-ray Studies

| | <u>Date</u> | <u>Exhibit</u> | <u>Doctor</u> | <u>Reading</u> | <u>Standard</u> |
|----|-----------------|--|--|----------------|-----------------|
| 1. | 11/07/03 | CX 2 | Whitehead B reader ⁴ Board cert. ⁵ | 1/0 | Fair |
| | <u>Comment:</u> | Calcified scar mid lung field, cardiomegaly. | | | |
| 2. | 11/07/03 | EX 7 | Wiot B reader | 0/0 | Fair |
| | <u>Comment:</u> | Previous CABG. No evidence of coal workers' pneumoconiosis; heart enlarged; deposition of subpleural fat along both lateral chest walls. | | | |
| 3. | 07/12/03 | CX 3 | Brandon B reader Board cert. | 1/1 q/t | Fair |
| 4. | 07/12/02 | DX 14 | O'Bryan | 0/1 q/t | Fair |
| 5. | 07/12/02 | EX 1 | Spitz B reader | 0/0 | Good |
| | <u>Comment:</u> | Coronary bypass, heart upper normal limits, lungs clear, subpleural fat deposition, aortic knob slightly prominent. | | | |

⁴ A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. See 42 C.F.R. § 37.51(b)(2).

⁵ A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. See § 718.202(a)(ii)(C).

| | | | | | |
|----|----------|-------|------------------------------------|--------------------------|---------------------------|
| 6. | 07/21/01 | DX 15 | Wheeler B reader Board cert. | 0/0 | Poor |
| 7. | 07/21/01 | DX 13 | Baker | 1/0 | Poor |
| 8. | 07/21/01 | DX 13 | Sargent B reader Board cert. | Read for quality only | Fair Under- exposed |

Pulmonary Function Studies

| | <u>Date</u> | <u>Ex.</u> | <u>Doctor</u> | <u>Age/Hgt.</u> ⁶ | <u>FEV₁</u> | <u>MVV</u> | <u>FVC</u> | <u>Standards</u> |
|----|-------------|------------|---------------|-------------------------------|------------------------|----------------|--------------|---|
| 1. | 11/07/03 | CX 4 | Houser | 56/69" Post-Bronchodilator | 1.68 1.89 | 78.04 83.21 | 2.10 2.24 | Tracings included, coop./comp. not listed. |
| 2. | 07/12/02 | DX 14 | O'Bryan | 55/70" Post-Bronchodilator | 1.62 1.80 | 95 59 | 1.91 2.09 | Tracings included, good coop./comp. |
| 3. | 07/21/01 | DX 13 | Baker | 54/69-3/4" | 1.93 | 79 | 2.42 | Tracings included, fair coop./good comp. |

Arterial Blood Gas Studies

| | <u>Date</u> | <u>Exhibit</u> | <u>Physician</u> | <u>pCO₂</u> | <u>pO₂</u> |
|----|-------------|----------------|------------------------------|------------------------|-----------------------|
| 1. | 07/12/02 | DX 14 | O'Bryan Post- Exercise | 46.7 45.0 | 69.8 81.2 |
| 2. | 07/21/01 | DX 13 | Baker | 43 | 71 |

Narrative Medical Evidence

1. Dr. William M. O'Bryan, a Board-certified Internist, Pulmonologist, and Critical Care Specialist, examined the Claimant on July 12, 2002 (DX 14). Based on symptomatology (dyspnea, chest pain, orthopnea, ankle edema), employment history (22 years above ground), individual and family histories, smoking history (28 yrs, one-half ppd, stopped 1993), physical examination (70" tall, 304 lbs.), chest x-ray (0/1), pulmonary function study (severe restrictive impairment), and an arterial blood gas study (carbon dioxide retention, hypoxemia),

⁶ The factfinder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find the Miner's height to be 70".

Dr. O'Bryan diagnosed severe obesity, hypertension, severe restrictive ventilatory impairment, diabetes, heart disease, and life threatening sleep apnea. He opined that "all of the above abnormalities are due to [Mr. Walden's] massive obesity, not related to his employment as a coal miner." He opined that the Miner's lung impairment is severe and irreversible unless the Miner loses half of his body weight.

2. Dr. Glen Baker, who presents no medical specialty credentials, examined the Claimant on July 21, 2001 (DX 13). Based on symptomatology (wheezing, chronic bronchitis, sputum, dyspnea, cough, hemoptysis, chest pain, orthopnea, ankle edema), employment history (20 years, strip), individual and family histories (heart disease), smoking history (10 years off and on, three-quarters ppd, quit 1993), physical examination (normal), chest x-ray (1/0), pulmonary function study (moderate restrictive defect), arterial blood gas study (mild resting arterial hypoxemia), and an EKG (normal), Dr. Baker diagnosed: (1) coal workers' pneumoconiosis based upon abnormal chest x-ray and coal dust exposure; (2) chronic bronchitis based upon a history of cough, sputum production and wheezing; (3) moderate restrictive defect based upon pulmonary function study; (4) mild hypoxemia based upon arterial blood gas readings; and, (5) ischemic heart disease by history. He opined that Mr. Walden suffers from an occupational lung disease caused by coal mine employment, and that he suffers from a moderate impairment caused by cigarette smoking, coal dust exposure, post-op changes, and cardiac disease. The Miner no longer has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

3. a. Dr. William C. Houser, who lists no medical specialty credentials, examined the Claimant on November 7, 2003 (CX 4). Based on symptomatology (dyspnea, cough, sputum), employment history (21½ years coal mine employment), individual and family histories (coronary bypass surgery, diabetes, two myocardial infarctions, gout, depression), smoking history (25 years, one-half ppd, quit 1993), physical examination (chest clear to percussion, diminished breath sounds, few scattered rales, 69" tall, 323 lbs.), chest x-ray (1/0), and pulmonary function study (moderate restrictive ventilatory impairment), Dr. Houser diagnosed: (1) coal workers' pneumoconiosis; (2) chronic obstructive pulmonary disease; (3) morbid obesity; (4) arteriosclerotic heart disease; (5) gout; (6) obstructive sleep apnea; (7) hypertension; (8) diabetes mellitus; and, (9) history of depression. He opined that:

Mr. Walden has sufficient occupational exposure and chest roentgenographic findings appropriate for the

diagnosis of coal workers' pneumoconiosis, category 1. He has moderate restrictive ventilatory impairment which is probably due to obesity and coal workers' pneumoconiosis. He also has findings of airway obstruction. I believe the airway obstruction is secondary to former cigarette smoking and exposure to coal and rock dust arising from his coal mine employment.

He opined that Mr. Walden is unable to perform his former employment as a coal miner due to coal workers' pneumoconiosis and pulmonary function impairment.

b. Dr. Houser was deposed by the Employer on November 20, 2003, when he repeated the findings of his written report (EX 6). Dr. Houser opined that obesity could cause a restrictive defect and that the restrictive impairments seen in the Miner could also be seen in a man of similar morbid obesity who had never been exposed to coal dust. He stated that the obstructive impairment seen in Mr. Walden could develop solely as a result of cigarette smoking.

4. Dr. Gregory Fino, a Board-certified Internist, Pulmonologist, and a B reader, performed a records review at the request of the Employer (EX 2). Dr. Fino reviewed the July 10, 1996, examination report of Dr. Powell, examinations performed for the Department of Labor on July 21, 2001, and July 12, 2002, and a letter submitted by Dr. O'Bryan dated July 17, 2002. Dr. Fino reported that the Miner was "at least 150 pounds overweight." He opined that reduction in FVC and FEV₁ measurements in the pulmonary function studies reviewed was a product of obesity and not of any pulmonary fibrotic process such as coal workers' pneumoconiosis. He supported his obesity etiology by citing to inconsistent abnormal x-ray interpretations and a lack of reduction in pO₂ readings with exercise. He opined that Mr. Walden is disabled from a respiratory standpoint, but he does not suffer from an intrinsic lung condition. "If he were not obese, then he would not be disabled. His disability has nothing to do with his years spent in the coal mining industry." "There is insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis."

V. Discussion and Applicable Law

The Claimant filed his black lung benefits claim on April 18, 2001 (DX 2). Because this claim was filed after

March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations.⁷

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. § 718, the claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§ 718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 B.L.R. 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Section 718.202 provides four means by which pneumoconiosis may be established. Under § 718.202(a)(1), a finding of pneumoconiosis may be made on the basis of x-ray evidence. The record contains seven interpretations of four different chest x-rays. The July 21, 2001 x-ray film was read by Dr. Sargent for quality purposes only, and he rated the film as fair.

The Board has held that an Administrative Law Judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-65 (1990), although it is within his or her discretion to do so, *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990). However, "administrative factfinders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts." *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993).

Interpretations of B readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. *Vance v. Eastern Assoc. Coal Corp.*, *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985); 8 B.L.R. 1-68 (1985). Physicians who are Board-certified Radiologists as well as B readers may be accorded still greater weight. *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993).

The November 7, 2003 x-ray was read as negative by Dr. Wiot, a B reader, and as positive by Dr. Whitehead, a Board-certified Radiologist and a B reader. I afford more weight to

⁷ Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of § 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

the dually certified reading of Dr. Whitehead and find that the November 7, 2003 x-ray evidence is positive for pneumoconiosis.

The July 12, 2003 x-ray was read as positive by Dr. Brandon, a B reader and Board-certified Radiologist. I give great weight to the dually certified interpretation of Dr. Brandon and find that the July 12, 2003 x-ray evidence is positive for pneumoconiosis.

The July 12, 2002 x-ray was read as negative by Dr. O'Bryan,⁸ who presents no specialty credentials in the interpretation of x-rays, and as negative by Dr. Spitz, a B reader. I give great weight to the combined negative readings by Drs. O'Bryan and Spitz and find that the July 12, 2002 x-ray evidence is negative for pneumoconiosis.

The July 21, 2001 x-ray was read as negative by Dr. Wheeler, a dually certified physician, and as positive by Dr. Baker, who lists no specialty credentials in the interpretation of x-rays. I afford more weight to the dually certified reading of Dr. Wheeler, and I find that the July 21, 2001 x-ray evidence is negative for pneumoconiosis.

The four negative readings by Drs. Wiot (a B reader), Wheeler (dually certified), O'Bryan, and Spitz (B reader) outweigh the three positive readings by Dr. Brandon and Dr. Whitehead (both dually certified physicians) and by Dr. Baker. I find that the x-ray evidence is negative for pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1).

Section 718.202(a)(2) is inapplicable because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions are found to be applicable. In the instant case, § 718.304 does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lung, including respiratory or pulmonary impairments,

⁸ An x-ray interpretation classified as 0/1 does not constitute evidence of pneumoconiosis. Twenty C.F.R. § 718.102(b).

arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

For a physician's opinion to be accorded probative value, it must be well reasoned and based upon objective medical evidence. An opinion is reasoned when it contains underlying documentation adequate to support the physician's conclusions. See *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. *Id.* A brief and conclusory medical report which lacks supporting evidence may be discredited. See *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); see also, *Mosely v. Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985). Further, a medical report may be rejected as unreasoned where the physician fails to explain how his findings support his diagnosis. See *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. William M. O'Bryan, a Board-certified Internist, Pulmonologist, and Critical Care Specialist, reviewed symptomatology, employment history, smoking history, family and individual medical histories, physical examination, chest x-ray, pulmonary function study, and an arterial blood gas study. Based on the information gathered, Dr. O'Bryan diagnosed no

pneumoconiosis. He stated that the Miner suffers from a severe restrictive ventilatory impairment, but that the impairment, like all of the other listed ailments, is "due to [Mr. Walden's] massive obesity, not related to his employment as a coal miner."

Dr. O'Bryan's opinion is well reasoned. He utilized a negative chest x-ray and then opined that while Mr. Walden's pulmonary function testing and arterial blood gas testing were abnormal, Mr. Walden's obesity was responsible for the restrictive impairment and hypoxemia recorded. He opined that the objective evidence, taken as a whole, did not support a diagnosis of pneumoconiosis. Dr. O'Bryan's opinion is based upon an evaluation of the objective evidence in light of physical examination observations. Noting Dr. O'Bryan's superior credentials, I afford his opinion great weight supporting a finding of no pneumoconiosis.

Dr. Baker, who presents no medical specialty credentials, diagnosed coal workers' pneumoconiosis based upon an abnormal chest x-ray and a history of coal dust exposure. In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute a sound medical judgment under § 718.202(a)(4). *Id.* at 576. Further, it is permissible to discredit physicians' opinions that amount to no more than x-ray reading restatements. See *Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993) (citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). The fact that a miner worked for a certain period of time in the coal mines alone "does not tend to establish that he does [or does not] have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. When a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id.* As Dr. Baker fails to state any other reasoning for his diagnosis of pneumoconiosis beyond the x-ray and a coal dust exposure history, I find his clinical pneumoconiosis diagnosis neither well reasoned nor well documented.

Dr. Baker also diagnoses chronic bronchitis evidenced by symptomatology and caused by a combination of cigarette smoking and coal dust exposure. As Dr. Baker diagnoses a chronic lung disease arising at least, in part, out of coal mine employment, his diagnosis fits within the definition of legal pneumoconiosis. Section 718.201(a)(2). Such a diagnosis, however, must still be well reasoned to be given probative

weight. A "reasoned" opinion is one in which the Administrative Law Judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Conversely, a report which is seriously flawed may be discredited. *Goss v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-400 (1984).

Dr. Baker failed to address the Miner's severe obesity, a significant factor in every other physician's opinion and etiology. Accordingly, I find Dr. Baker's opinion to be seriously flawed, undocumented, and not well reasoned. Noting Dr. Baker's lack of medical specialty credentials, I afford less weight to his opinion.

Dr. Houser, who lists no medical specialty credentials, diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and a restrictive ventilatory impairment. He based his coal workers' pneumoconiosis diagnosis on x-ray findings and a history of occupational exposure. He based his airway obstruction diagnosis on cigarette smoking combined with coal and rock dust arising out of coal mine employment. He based the restrictive ventilatory impairment on obesity and coal dust exposure.

Dr. Houser's coal workers' pneumoconiosis diagnosis is not well reasoned as he bases his conclusions upon a positive x-ray and a coal dust exposure history. See *Taylor*, supra. Dr. Houser also diagnoses chronic obstructive pulmonary disease and a restrictive ventilatory impairment based on pulmonary function testing, symptomatology, physical examination observations, and, in part, on a coal dust exposure history. Such a finding fits within the legal definition of pneumoconiosis. Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Section 718.201(a). Dr. Houser backed away from his coal dust exposure etiology in his deposition, however, stating that obesity alone would cause the type of restrictive defect seen in the Claimant, and that cigarette smoking alone could cause the type of obstructive impairment suffered by Mr. Walden. A physician's opinion may be found unreasoned given inconsistencies in the physician's testimony and other conflicting opinions of record. *Brazzale v. Director, OWCP*, 803 F.2d 934 (8th Cir. 1986). Further, an opinion may be given little weight if it is equivocal or vague. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000). Dr. Houser equivocates on whether the chronic obstructive pulmonary disease and restrictive ventilatory impairment are caused by coal mine employment. I find his etiology determination unreasoned and, therefore, I find that the Miner's COPD and restrictive

impairment do not fall within the definition of legal pneumoconiosis. Noting Dr. Houser's lack of medical specialty credentials, I afford his opinion less weight.

Dr. Fino, a Board-certified Internist, Pulmonologist, and a B reader, performed a records review at the request of the Employer. A nonexamining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984). Dr. Fino found "insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis." Dr. Fino found the x-ray evidence reviewed to be negative, and he utilized the pulmonary function testing of record to opine that the Miner's severe obesity caused all observed reductions in FVC and FEV₁ readings. He opined that the arterial blood gas readings supported his obesity etiology, as the Miner did not show a reduction in his pO₂ reading upon exercise.

As Dr. Fino's conclusions are corroborated by both the well-reasoned opinion of Dr. O'Bryan, an examining physician, and by the evidence considered as a whole, I give greater weight to this nonexamining physician's opinion supporting a finding of no pneumoconiosis.

Taken as a whole, Dr. O'Bryan, a Board-certified Internist, Pulmonologist, and Critical Care Specialist, and Dr. Fino, a Board-certified Internist, Pulmonologist, and a B reader, provide well-reasoned opinions, based upon objective medical evidence, that the Claimant does not suffer from pneumoconiosis as defined in § 718.201. The contrary opinions of Drs. Baker and Houser, who list no medical specialty credentials, are outweighed by the better-reasoned opinions and superior credentials of Drs. O'Bryan and Fino. Accordingly, I find that the Claimant has not established the existence of pneumoconiosis under § 718.202(a)(4).

Causal Connection Between Pneumoconiosis and Coal Mine Work

Because the Claimant has not established pneumoconiosis, the question of whether it is caused by his coal mine employment is moot. Moreover, even though the evidence establishes more than 10 years of coal mine work, any presumption of a causal connection with coal mine employment is more than adequately rebutted by the medical opinion evidence discussed above. Therefore, the evidence fails to establish this element of the claim.

Total Disability

Since the Miner does not have pneumoconiosis, his claim cannot succeed. In any event, had he established the existence of the disease, the evidence does not show that he has a totally disabling respiratory or pulmonary ailment which can be attributed to pneumoconiosis. Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his or her usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. Section 718.204(b)(1)(i) and (ii). The Claimant must establish by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his total disability. See, e.g., *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). Total disability can be established pursuant to one of the four standards in § 718.204(b)(2) or through the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b)(1). The presumption is not invoked here because there is no x-ray evidence of large opacities and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(c), the precursor to § 718.204(b)(2), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987).

Section 718.204(b)(2)(i) permits a finding of total disability when there are pulmonary function studies with FEV₁ values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or,
2. MVV values equal to or below listed table values; or,
3. A percentage of 55 or less when the FEV₁ test results are divided by the FVC test results.

The record contains three pulmonary function studies. The results of each test qualify under the listed disability standards of the Act. Drs. O'Bryan and Fino opined, however, that all abnormal pulmonary function readings were a result of the Miner's massive obesity and not a function of coal dust exposure and/or coal mine employment. Dr. Houser opined that both obesity and coal workers' pneumoconiosis caused the

abnormal pulmonary readings, but he testified during his deposition that obesity alone could account for the qualifying readings. Dr. Baker failed to account for the obesity of the Miner in his findings, and I find that Dr. Baker's opinion on total disability is not well reasoned due to that omission. Given the superior qualifications of Drs. O'Bryan and Fino, I find that the pulmonary function readings, while qualifying, are the result of morbid obesity and not manifestations of coal workers' pneumoconiosis. I find that the pulmonary function testing supports a determination of total disability but does not support a finding of total disability due to pneumoconiosis.

Total disability may be found under § 718.204(b)(2)(ii) if there are arterial blood gas studies with results equal to or less than those contained in the tables. The record contains two arterial blood gas studies. All arterial blood gas testing results are nonqualifying.

There is no evidence presented, nor do the parties contend that the Claimant suffers from cor pulmonale or complicated coal workers' pneumoconiosis.

Under § 718.204(b)(2)(iv) total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work. There are four medical narratives in the record discussing the Claimant's impairment level.

Dr. O'Bryan, a Board-certified Internist, Pulmonologist, and Critical Care Specialist, opined that the Miner's lung impairment is severe and irreversible unless the Miner was to lose half of his body weight. He opined that all the Miner's "abnormalities are due to [Mr. Walden's] massive obesity, not related to his employment as a coal miner." Dr. O'Bryan used the objective evidence along with physical examination observations to reach his total disability diagnosis. Noting Dr. O'Bryan's superior credentials, I find this opinion well reasoned and afford it substantial weight supporting total disability but not supporting total disability due to pneumoconiosis.

Dr. Baker, who lists no medical specialty credentials, diagnosed total disability caused by coal dust exposure, cigarette smoking, post-op changes and cardiac disease. Dr. Baker did not factor the Miner's obesity into his evaluation. As all other physicians of record found

Mr. Walden's morbid obesity to be highly significant in their evaluations, I find Dr. Baker's failure to incorporate the Miner's obesity into his diagnosis to be a serious flaw in his analysis. A report which is seriously flawed may be discredited. *Goss v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-400 (1984). I find that Dr. Baker's opinion is not supported by the evidence, and is, thus, unreasoned. Noting Dr. Baker's lack of specialty medical credentials and his failure to discuss the Claimant's obesity, I afford his opinion less weight.

Dr. Houser, who lists no medical specialty credentials, opined that Mr. Walden is unable to perform his previous coal mine employment due to coal workers' pneumoconiosis and pulmonary function impairment. When deposed on November 20, 2003, however, he opined that the pulmonary function impairment seen in the Claimant could be caused entirely by obesity and cigarette smoking. An equivocal opinion regarding etiology may be given less weight. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988). Dr. Houser's total disability diagnosis is based primarily on pulmonary function impairment. As such, it is based on objective data, and is supported by the record. His opinion regarding the etiology of total disability is equivocal. I find that the opinion of Dr. Houser is well reasoned regarding his finding of total disability, but equivocal and unsupported in the etiology of total disability. Noting Dr. Houser's lack of medical specialty credentials, I afford his disability opinion less weight and I find that his opinion does not support total disability due to pneumoconiosis.

Dr. Fino, a Board-certified Internist, Pulmonologist, and a B reader, opined that the Miner is disabled from a respiratory standpoint, but that he does not suffer from an intrinsic lung condition. "If he were not obese, then he would not be disabled." He supported that diagnosis by discussing inconsistent x-ray interpretations and by noting there was no reduction in the Miner's arterial blood gas pO₂ levels with exercise. Dr. Fino used the objective data in the record to support his diagnosis of total disability due solely to obesity. I find his opinion well reasoned and well documented. Noting Dr. Fino's superior qualifications, I give substantial weight to Dr. Fino's opinion that the Miner is totally disabled, but not totally disabled due to pneumoconiosis.

As a result of abnormal pulmonary testing (resulting from severe obesity and not pneumoconiosis), nonqualifying arterial blood gas testing, and the well reasoned opinions of Drs. O'Bryan and Fino, I find that the Claimant has established total disability pursuant to § 718.204(b)(2) but has failed to

establish total disability due to pneumoconiosis under § 718.204(c).

VI. Entitlement

Paul Ray Walden, the Claimant, has not established entitlement to benefits under the Act.

VII. Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claim of Paul Ray Walden for benefits under the Act is hereby DENIED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esq., 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.